IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 109 OF 2003

1. Subhash Namdeo Patil)
2. Parshuram Mahadeo Patil)
3. Kamlakar Mahadeo Patil) ...Appellants

versus

The State of Maharashtra & ors. ...Respondents

WITH

CRIMINAL APPEAL NO. 110 OF 2003

1. Mahendra Ananta Patil)
2. Ananta Mahadeo Patil)
3. Tukaram Mahadeo Patil) .... Appellants

versus

The State of Maharashtra & ors ... Respondents.

Shri A.P.Mundargi Sr. Adv. with Ganesh Gole for the appellants.
Mrs. V.R.Bhosale APP for Respondent.

CORAM; V.G. PALSHIKAR &
SMT.NISHITA MHATRE,JJ.

DATED; TH DECMBEER, 2006.

JUDGMENT: (Per Palshikar, J.)

1. By these appeals, the appellants/original accused have challenged their conviction by the II Adhoc Additional Sessions Judge, Raigad in Sessions Case No.5 of 1999, sentencing them on various offences.

2. Criminal Appeal No.109 of 2003 has filed by accused nos.2,4 and 6 who have been convicted under section 326

read with 149 IPC for three years imprisonment and others by lessor punishment. Criminal Appeal No. 110 of 2003 has filed by accused nos. 1,3 and 5 who have been convicted by the learned trial Judge to suffer imprisonment for life under section 302 read with 149 of the I.P.C.

3. The Sessions trial was one, the impugned order is one, but the conviction is different. In one appeal (i.e. Cri.Appeal No.109/03) the accused have been convicted to suffer R.I. for three years and therefore it is liable to be heard by a learned single Judge of this court whereas in Cri.Appeal No.110/03 the accused are convicted to suffer imprisonment for life and their appeal is liable to be heard by a Division Bench. Taking into consideration the fact that the judgment and trial is same, these appeals are heard by the Division Bench. With the assistance of the learned advocate for the accused and the learned Addl.P.P. we have reappreciated the entire evidence on record. We have scrutinised the documents on record. The prosecution case as disclosed by this re-appreciation stated briefly is as under:

4. Accused Mahendra and Subhash were having grudge against deceased Harishchandra for the reason that they were suspecting that deceased Harishchandra had told

about the love affair of Subhash and one Surekha Mundkar, the cousin-sister of deceased Harishchandra to her parents. They were also annoyed with him because he had objected their playing cricket in the Radhakrishna temple in the village and were in search of the opportunity to assault him.

5. On 4-9-1998 accused Mahendra and Subhash had assaulted Harischandra by means of fist and hand blows in front of house of Jaidas Bama Mundkar at about 10.30 p.m. and that incident was witnessed by his brother Kamlakar Bhoir, as he had been to the house of Jaidas Mundkar and was watching T.V. along with Ashok Mundkar. Kamlakar had then intervened the quarrel and then they had proceeded further and reached in front of house of one Jomibai Mundkar, their maternal aunt and were watching as to whether Harischandra Bhoir had sustained any injury. By the time accused Tukaram, Ananta, Mahendra and Subhash had rushed there. They were armed with iron bar, iron pipe, sickle and iron rod, respectively. Accused Tukaram and Ananta had caught hold of Harischandra and accused Mahendra had assaulted Harischandra by means of sickle on his stomach. Harischandra had collapsed when Kamlakar resisted, accused Mahendra assaulted him by means of sickle on his ear and his ear was cut. He was also assaulted by means of iron rod. They were abusing in

filthy language by saying 'madarchod' etc. By the time father of Harischandra, Pandurang Bhoir and his uncle Lahu and aunt Gulab reached there and tried to intervene. Accused Kamalakar Patil and Ananta had assaulted Lahu Bhoir by means of iron pipe and accused Parshuram had also assaulted Pandurang on his head by means of electric tube and also caused injury to Gulab, paternal aunt of deceased Harischandra. Kamalakar had then somehow managed to escape and being scared had rushed to main road, stopped one dumper and went to Panvel city police station and narrated the incident.

6. On the basis of the FIR, investigation was carried out and six persons, the appellants in the above two appeals, were prosecuted for various offences. The prosecution examined as many as 10 witnesses to prove its case and the learned trial Judge on appreciation of this evidence convicted the appellants as stated above. It is this order of conviction, which is impugned in these appeals.

7. Mr. Mundargi the learned advocate appearing on behalf of the appellants submitted that there are gross contradictions and omissions in the evidence of the so called eye witnesses. Their testimony does not inspire confidence. It is obviously motivated and therefore could not have been relied upon by the learned trial

Judge. According to the learned advocate the testimony of one witness who claims to be eye witness is to be accepted, the testimony of other witnesses claimed to be eye witnesses will have to be disbelieved. Similarly there are material contradictions in the statement of the witnesses recorded by the police and the depositions of these persons in the court. So considered it cannot be said with any certainty that the prosecution has proved beyond reasonable doubt that the accused were the persons who were the assailants of the victim. These submissions were countered by the learned A.P.P. saying that the witnesses obviously are related with the accused and their presence at the scene of offence cannot be doubted. It can also be noted that they should be disbelieved only because they are interested persons. The contradictions and omissions as pointed out by the advocate are not of such nature as would require rejection of the entire testimony of all the witnesses. We have to examine these contentions in the light of the reappreciated evidence on record.

8. P.w.1 Kamalakar is the brother of the deceased Harishchandra and was the person who lodged the FIR. This witness has deposed before the court the incident which took place on 4-9-1998 at about 10.00 p.m. According to the witness he was watching T.V. at the

house of one Jaidas when he heard shouts from outside. He therefore came out of the house and saw accused Mahendra and Subhash beating his brother Harishchandra by fist blows. This witness therefore intervened in the quarrel. Accused persons abused the witness and left the place. According to this witness when they came in front of another house where there was light and the witnesses wanted to ascertain the extended injuries caused to the victim Harishchandra by fist blows, it was then that accused no.1 Mahendra, accused no.2 Subhash, accused no.3 Tukaram and accused no.4 Ananta have come there. According to this witness Mahendra was armed with sickle and Subhash was having iron bar, Tukaram was having iron bar and Ananta was having iron pipe. This was happened in front of the house of one Gauribai Mundkar. He then graphically describes what happened thereafter. First accused Mahendra said that Harishchandra should be beaten up and after saying this he gave a blow by the sickle in the stomach of the victim. The witness therefore went there and told them not to assault the victim. Therefore accused Mahendra gave a blow of sickle on the left ear of the witness as a result of which the left ear was cut of. He therefore was scared and left the place. It is pertinent to note therefore that inspite of having seen the brutal attack on his brother Harishchandra, the witness left the place leaving the

bleeding Harishchandra at the spot. Earlier he has not mentioned the presence of or entry of Parshuram. But then he states that by the time he left the place Parshuram has assaulted the father of the witness by means of a electric tube on his head. A scrutiny of the spot panchanama will disclose that there were no fragments of a shattered tube found on the spot. This obviously is a intended improvement.

9. The witness then speaks of his uncle Lahu Bhoir at the spot. He then says that Tukaram and Kamalakar assaulted his uncle Lahu by means of iron pipe. However, he has not deposed any time earlier that Kamalakar had iron pipe in his hand. He then says that:

> "I was still there standing beside and witnessed all the incident. When all of them were assaulting, I ran away and came on main road of the village."

He says this immediately after having stated on oath that after his ear lobo was cut, he got scared and left the place. He had also stated that he had stopped one dumper proceeding from the road. The driver of the dumper stopped the dumper and the witness told the driver that he had been assaulted by the Patil people

and claimed a lift towards police station. He reached the police station and narrated the incident and recorded the information.

10. These statements made by the witness in his examination-in-chief are completely shredded by the cross examination of this witness by the advocate of the accused. One after another he admits his contradictions and omissions. In his cross examination he deposes that he heard the shouting. It was about 15 to 20 people shouting. But it was only he alone came out of the house of Jaidas from amongst those who present there to watch the T.V. About 15 to 20 persons were shouting according to this witness and yet no independent witness is examined. He then admits that he did not personally see the accused Mahendra and Subhash beating Harishchandra the victim by fists and kicks. He then says that he was scared and therefore he felt that he should report the assault to his father and therefore he rushed towards his house. He then admitted that while rushing to his house he has seen 15 to 20 persons coming towards the spot. He then admits that he cannot identify any of them because of the darkness and yet he claims that he identified the accused individually so also the weapons in their hands and the description and manner in which the assault took place. Then several omissions are noticed.

11. A scrutiny of his statement which was recorded and which was the FIR, shows that several things were not mentioned by him in the report which he deposed and several things which he deposed were not mentioned to the police. He has not stated in his examination in chief that he told the driver that his brother has been assaulted. In this FIR he mentioned all the six names whereas in his deposition before the court there is no mention of Kamalakar and Parshuram. These omissions are certainly of material nature and cohesive reading of the entire deposition of this witness creates a feeling that the witness is not telling the whole truth.

12. P.w.2 is the doctor who conducted the post mortem and has proved that the death of Harishchandra was homicidal in nature. P.ws. 3 and 4 are panchas for various documents allegedly executed by the police. Both of them have turned hostile. P.ws. 8,9 and 10 are the police officers responsible for investigation and execution of certain panchanamas to which P.ws.2 and 3 were the panchas. Each one of them do prove the panchanama effectively made by them. Testimony of these police officers proved those documents. It will be pertinent to note that the spot panchanama delies the deposition of P.w.1 because the witness has stated

that his father P.w.5 was beaten with the tube light. If that is so, crushed pieces of tube light bound to be there on the spot. The spot panchanama does not disclose this. Therefore the statement that the father was hit by one of the accused is proved to be false.

13. That takes us to the consideration of the evidence of remaining eye witnesses i.e. P.w.5, P.w.6 and P.w.7. P.w.5 is the father of P.w.1 and the deceased. He has deposed before the court that on 4-9-1998 at about 10.30 he was at home when his brother Lahu came to him and told him that the accused were assaulting and beating Harishchandra. He therefore, rushed to the spot which was in front of the house of Suresh who is examined as P.w.6 another eye witness by the prosecution. He then deposed that he saw the accused Tukaram and Ananda holding Harishchandra and Mahendra assaulting him. He therefore shouted and according to him then Suresh came to the spot. According to him intervention of Suresh was unsuccessful and then accused Mahendra took out a sickle and gave a blow in the stomach of Harishchandra. This witness nowhere speaks anything about the presence of accused Subhash. He also has not stated anything as to how Parshuram came on the spot but he says that Parshuram hit him on the head by iron pipe. So according to the father P.w.5, he was hit by Parshuram by iron pipe whereas

Kamalakar says that his father was hit by Parshuram by tube light. He goes on to say that he sustained injury to his head and after some time police came there. So, according to this witness police came on the spot when everybody was fighting there at the spot. Through out his examination, he nowhere speaks of assault on Lahu. According to him, he came on the spot after being told by Lahu to that effect. He has mentioned that brother Lahu and he himself has taken to the hospital by police. He has very categorically stated in the examination-in-chief itself that he did not know at that time where his son Kamalakar had been. So according to this witness, Kamalakar was not present at the spot and he came on the spot at the instance of Lahu and he does not say anything about the assault on Lahu. He does not say anything about the assault on Gulab wife of Lahu. The contradictions are galore. It is obvious that the witness were totally confused. At one place he speaks of his son, presumably Kamalakar, tried to intervene and at another place he says that he does not know what happened to Kamalakar. According to him, Parshuram was hit by iron pipe and according to Kamalakar he was assaulted by tube light. He also stated in his cross examination that house of Lahu is at a far distance from his house. If that is so, and it is obvious that the assault was over much earlier than their arrival, he could not have been the eye

witness. In his cross examination he candidly says that he was not hit by tube light.

14. The evidence of these two witnesses, who are closely connected with each other and the victim, although claimed to be the eye witnesses, is far from satisfactory. If one is to be accepted the other has to be rejected as false.

15. Then we have to analyse the evidence of P.w.6 Suresh before whose house, the incident is alleged to have taken place. He states that he was sitting in his house at 10.30 in the evening after dinner. He was sitting in his new house. He then says that "The big fighting was going on between the accused and Pandurang, his son Kamalakar, Harishchandra and Lahu, Gulab etc. in front of my old house. After hearing a sound of quarrel, I came out." He then tried to intervene but failed. According to this witness, Kamalakar P.w.1 complainant also had an iron bar in his hand. According to this witness Parshuram gave a blow of iron pipe on the head of Pandurang and thereafter Kamalakar left the spot. He speaks of injuries caused to Lahu also. In the cross examination several omissions and contradictions are borught on record. The story of this witness is therefore entirely different than the one which we asked to believe by

P.ws. 1 and 5 the father and the son.

16. P.w.7 is Lahu brother of P.w.5 Pandurang. He also has deposed as an eye witness. He has stated that on 4-9-1998 at about 10 p.m. he was sleeping in his house and his son who had gone out to see ganesh festival returned home and told him that Harishchandra was assaulted. He therefore woke up and wanted to call his brother pandurang. Then he along with Panmdurang went to the spot in the front of the house of Suresh. He then deposed that he saw the quarrel going on between the accused present in the court and Harishchandra. He then described the assault, names of the accused as Mahendra, Subhash, Tukaram and Kamalakar as the persons present with iron rods in their hands and Parashuram and Anant having pipes in their hands. He then describes how Harishchandra was held by Tukaram and Anant and how the accused Mahendra gave a blow of sickle on the stomach of Harishchandra. When he tried to intervene, accused Anant gave him a blow on the head with the iron pipe and he fell down. This witness therefore claims that he was assaulted by accused Ananta and he does not say anything about the assault on Pandurang. Pandurang P.w.5 also states that he was informed by Lahu P.w.7 regarding the assault on Harishchandra. But he speaks of going to the spot but he does not speak of going to the spot with Lahu.

There is no mention in his entire examination regarding the presence of Lahu except the statement that he, his son, brother Lahu and wife Gulab went to the hospital. If the testimony of P.w.7 Lahu is to be accepted, he does not speak of any injury on Pandurang. If the deposition of Pandurang is to be accepted, he does not mention the presence of Lahu, which consequently falsifies his claim of being injured. In his cross examination he has admitted several omissions and contradictions. He has deposed in his examination-in-chief that police arrived at the scene and they took the witness along with others to the hospital at Panvel. But in his cross examination he says that after he was assaulted he fell and does not know what happened thereafter. The testimony of these witnesses who claimed to be eye witnesses therefore creates a reasonable doubt in the minds of an ordinary prudent man as to who is speaking the truth and as to what exactly is the truth. That Harishchandra was assaulted is proved. Who had assaulted him, why he was assaulted, who exactly were present, is not forthcoming. These witnesses have not put before the court genuinely thwe case which they had told before the police. In our opinion, the evidence is so contradictory that it is impossible to believe the eye witness account of any of the four witnesses. If that eye witness account is left out of consideration,

then there is nothing on record on the basis of which it can be said that the prosecution has proved beyond reasonable doubt, the involvement of the accused in the killing of Harishchandra. The learned trial Judge ignored these contradictions and omissions while coming to the conclusion of guilt. In our opinion, it is unsafe in such circumstances to uphold the order of conviction as passed by the learned trial Judge. In the result the appeals succeed and are allowed. The impugned order is set aside. Accused Nos. 2, 4 and 6 be set at liberty forthwith if not otherwise required. The accused nos. 1,3 and 5 are on bail. Their bail bonds stand cancelled. Both the appeals are thus allowed and disposed of.

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